Neutral Citation Number: [2017] EWHC 2556 (Admin)

Case No: CO1875/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2017

Before :

MRS JUSTICE MOULDER

- -

Between :

THE GENERAL MEDICAL COUNCIL	**Appellant**
- and -	
DR SHEKHAR CHANDRA	**Respondent**

- -
- -

Eleanor Grey QC (instructed by **GMC Legal**) for the **Appellant**
Claire Watson (instructed by **Radcliffes**) for the **Respondent**

Hearing date: 11 October 2017

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Approved Judgment

Mrs Justice Moulder :

1. This is an appeal under section 40A of the Medical Act 1983 (the "Act") by the General Medical Council against a decision of a Medical Practitioners Tribunal ("MPT" or the "tribunal") under section 41 of the Act that the respondent be restored to the register.

Background

2. In 2005 the respondent was working as a psychiatrist on the Isle of Wight. In June 2005 he saw a vulnerable patient, Miss A, in a clinic and on the second occasion on 1 July 2005, the respondent went back to her house, put his hand on her leg, stroked her hand and kissed her. He then returned to work but later that night returned to her house, went to her bedroom with her and sexual activity took place including oral sex.

3. On 3 July 2005 Miss A was admitted to hospital following an overdose but the respondent did not disclose his contact with her. He subsequently met her in his car on 21 September 2005 having been approached by her in the car park of the hospital.

4. A Fitness to Practise Panel which sat in August 2007, March 2008 and May 2008 found the respondent's conduct to be inappropriate, unprofessional and not the standard expected of a medical practitioner. It determined that the respondent's name should be erased from the medical register.

5. The respondent made an unsuccessful appeal to the High Court in 2009.

Anonymity

6. Pursuant to CPR 39.2(4) in order to protect the interests of the respondent the identity of the witnesses referred to in this case must not be disclosed.

Grounds of appeal

7. The overall point of principle raised by the GMC are the requirements that must be satisfied before it will be in the public interest to restore a doctor such as the respondent to the register and whether it was in the public interest to do so (paragraph 24 of counsel for the appellant's submissions). This is central to ground C of the grounds of appeal which is expressed as a failure by the tribunal to give proper regard to the overriding public interest and to promote and maintain public confidence in the medical profession in particular. The other Grounds of Appeal are in summary as follows:

    i) a failure by the MPT to consider the evidence of previously inconsistent and untruthful accounts and/or to give reasons regarding the same;

    ii) a failure by the MPT to have regard to the doctor's failure to apologise to patient A;

Statutory Framework: appeals under section 40A

8. The legal framework and principles applicable to appeals under section 40A of the Act are common ground. The court will allow an appeal under CPR 52.21 (3) if it is

"*wrong*" or "*unjust because of a serious procedural or other irregularity in the proceedings in the lower court*".

9. The court may draw any inferences of fact which it considers are justified on the evidence: CPR 52.21 (4)

10. In regulatory proceedings the appellate court will approach the tribunal's determinations with diffidence – *Fatnani and Raschid –v- General Medical Council [2007] EWCA Civ 46* at paragraph 16. However there may be matters such as dishonesty or sexual misconduct where the court is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the tribunal: *Khan –v- General Pharmaceutical Council [2016] UKSC 64, 1 WLR 169* at paragraph 36 (c).

Statutory framework for the MPT

11. Section 41 of the Act provides (insofar as material to the issues before the court) that:

> *"(1) Subject to subsections (2) and (6) below, where the name of a person has been erased from the register under section 35D above, a Fitness to Practise Panel may, if they think fit, direct that his name be restored to the register.*
>
> *(2) No application for the restoration of a name to the register under this section shall be made to a Fitness to Practise Panel—*
>
> *(a)before the expiration of five years from the date of erasure; or…*
>
> *(6) Before determining whether to give a direction under subsection (1) above, a Fitness to Practise Panel shall require an applicant for restoration to provide such evidence as they direct as to his fitness to practise; and they shall not give such a direction if that evidence does not satisfy them.*
>
> *…*
>
> *(12) In exercising a function under this section, a Medical Practitioners Tribunal must have regard to the over-arching objective." [emphasis added]*

The over-arching objective is set out in section 1(1A) of the Act:

> *"The over-arching objective of the General Council in exercising their functions is the protection of the public."*
>
> *(1B) The pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives—*

> *"(a) to protect, promote and maintain the health, safety and well-being of the public,"*
>
> *"(b) to promote and maintain public confidence in the medical profession, and"*
>
> *"(c) to promote and maintain proper professional standards and conduct for members of that profession."*

12. In addition, guidance on applications for restoration to the register is provided to doctors by the GMC in its document "*Guidance for Doctors on Restoration following Erasure by a Medical Practitioners Tribunal".* At paragraph 10 of that document the guidance states that the tribunal will consider a number of factors including: the circumstances that led to erasure; the reasons given by the previous tribunal (or committee) for the decision to direct erasure; whether the applicant has any insight into the matters that led to erasure; what the applicant has done since his name was erased from the register; the steps the applicant has taken to keep his medical knowledge and skills up-to-date and the steps taken to rehabilitate himself professionally and socially.

The proper test to be applied when considering applications for restoration to the register

GMC's submissions

13. For the GMC it is submitted that the breadth of the public interest engaged in the decision, the difficulties in "remediating" dishonest actions or other serious forms of misconduct and the fact that the gravity of the original conduct which led to erasure can all still be fully considered, are combined so that it can properly be said that there must be "exceptional circumstances" before a doctor struck off for sexually improper conduct should be put back on the register.

14. The GMC relies on the principles developed in the context of solicitors' misconduct and submits that these principles establish the threshold before an application for restoration should be successful. The appellant submits that although these authorities were not put before the tribunal below, the principles should be followed by this court in its review of the tribunal's decision either because the principles set out in the solicitors' cases apply equally to doctors as a matter of law or because they constitute appropriate guidance as to the requirements of the public interest in the circumstances of restoration cases.

15. The GMC accepts that the tribunal's determination addressed the subject of the doctor's remediation. Counsel however relies on the authorities regarding the difficulty of achieving "remediation" in cases of sexual offending: *Yeong v GMC.*

16. Further counsel for the GMC submitted that having regard to the overarching objective required serious consideration not only the issue of "remediation" but of

    i) the timing of the development of the applicant's insight: how long it had existed prior to the hearing.

ii) The question of whether the doctor had built up sufficient resilience to withstand similar pressures in the future.

iii) the absence of any apology to patient A up to the point of the hearing.

iv) the impact upon public confidence in restoring to the register at this point in time, a doctor who had committed the serious acts of misconduct which the respondent had committed.

Respondent's submissions

17. Counsel for the respondent submitted that in considering an application for restoration insight, remorse, personal and social rehabilitation and testimonial evidence are all relevant matters that should be considered. Although the circumstances that led to erasure can be considered by the tribunal, counsel submitted that a decision to refuse an application for restoration should not be made solely to mark the gravity of the original misconduct.

18. Counsel further submitted that it is the GMC's case that the only appropriate decision for the purpose of satisfying the overarching requirement of protecting the public was to refuse the respondent's application. This contention undermines the role of the specialist tribunal and is inconsistent with the authorities which emphasise that the discretion vested in the tribunal is very broad: *Banerjee [2015] EWHC 2263 (Admin).*

Discussion

19. The GMC rely on the authorities in connection with solicitors in particular the line of authority from *Bolton v the Law Society [1994] 1 W.L.R. 512*. This was a decision of the Court of Appeal. The Law Society appealed against a decision of the Divisional Court which quashed a penalty of suspension imposed by the Solicitors Disciplinary Tribunal. The Court of Appeal held that the Divisional Court had erred in interfering with the decision of the SDT. Sir Thomas Bingham MR gave the judgment of the court. He noted that the tribunal had accepted that Mr Bolton was an honest man but he had failed to abide by the rules relating to the holding of money on behalf of others. The tribunal considered that his conduct was wholly unacceptable and would ordinarily merit striking off but on the facts the tribunal decided to make the more lenient order of suspension. Sir Thomas Bingham MR said:

> *"It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness...*
>
> *Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for*

the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension.

It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole

> *profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.*
>
> *Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."* [Emphasis added]

20. This authority was cited with approval by the Privy Council in the case of *Gupta v General Medical Council [2001] UKPC 61*. The appellant, a doctor, had been erased from the register by a Professional Conduct Committee of the General Medical Council. She appealed on the question of whether the decision was bad for want of reasons and the sanction excessive given the mitigating circumstances. The Privy Council held that the sanction of erasure was wholly appropriate for the protection of the public and of the standing of the profession. Lord Rodger of Earlsferry gave the judgment of the court and at paragraph 21 said:

> *"It has frequently been observed that, where professional discipline is at stake, the relevant committee is not concerned exclusively, or even primarily, with the punishment of the practitioner concerned. Their Lordships refer, for instance, to the judgment of Sir Thomas Bingham MR in* Bolton v Law Society [1994] 1 WLR 512, *517–519 where his Lordship set out the general approach that has to be adopted. In particular he pointed out that, since the professional body is not primarily*

> *concerned with matters of punishment, considerations which would normally weigh in mitigation of punishment have less effect on the exercise of this kind of jurisdiction. And he observed that it can never be an objection to an order for suspension that the practitioner may be unable to re-establish his practice when the period has passed. That consequence may be deeply unfortunate for the individual concerned but it does not make the order for suspension wrong if it is otherwise right. Sir Thomas Bingham MR concluded, at p 519: "The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price." Mutatis mutandis the same approach falls to be applied in considering the sanction of erasure imposed by the committee in this case."* [Emphasis added]

21. The GMC also rely on the case of *Patel v The General Medical Council [2003] UKPC 16*. In that case the appellant appealed against a direction made by the Professional Conduct Committee that his name be erased from the register in consequence of eight criminal convictions. The appellant argued that the direction of erasure was unjust. Lord Steyn dismissed the appeal:

> *"[10] On the other hand, as the Professional Conduct Committee observed, Dr Patel defrauded his employer over a period of eight months. The Professional Conduct Committee concluded that:*
>
> *"The purpose of today's hearing is not to punish you a second time for the offences of which you were convicted, but to protect the public interest by preserving public trust in the profession and maintaining high standards of conduct as well as protecting members of the public.*
>
> *The Committee have balanced the need to protect the public interest against the consequences of any order that would deprive you of your livelihood. The behaviour described to the Committee today cannot be tolerated in a registered medical practitioner. By your actions you have been guilty of behaviour liable to bring the medical profession into disrepute, and to undermine public confidence in the profession.*
>
> *The Committee bore in mind the words of Lord Bingham, Master of the Rolls, in the case Bolton v Law Society adopted by the Privy Council in the case of Dr Gupta, Privy Council appeal No. 44 of 2001, and I quote:*
>
> *'The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession bring many benefits, but that is part of the price.'*

> *The Committee are satisfied that neither conditions nor a period of suspension from practice would be sufficient to meet the gravity of the offences you committed, or protect the public interest, and have therefore concluded that they have no option but to direct the Registrar to erase your name from the medical register."*
>
> *Their Lordships consider that the Professional Conduct Committee was right to be guided by the judgment in Bolton v Law Society [1994] 1 WLR 512. It is true that in that case misconduct by a solicitor was at stake. But the approach there outlined applies to all professional men. There can be no lower standard applied to doctors: Gupta v General Medical Council [2002] 1 WLR 1691, at paragraph 21, per Lord Rodger of Earlsferry. For all professional persons including doctors a finding of dishonesty lies at the top end in the spectrum of gravity of misconduct. That is what was involved in this case.*
>
> *[11.] This is the context in which the argument that a direction for erasure of Dr Patel's name from the Medical Register was unjust must be considered. Giving careful consideration to all the mitigating factors advanced, the Board concludes that the Professional Conduct Committee was right to subordinate those subjective factors to the objective need to protect the public interest."* [Emphasis added]

22. In relation to the authorities concerning solicitors, counsel for the GMC accepted that these were not before the tribunal below. But counsel submitted that the principles should be followed by this court in its review of the tribunal's decision either because the principles set out apply equally to doctors as a matter of law or because they constitute appropriate guidance as to the requirements of the public interest in the circumstances of restoration cases.

23. The principles to be applied by the High Court when considering an application for restoration to the register have been considered in few cases: doctors whose applications for restoration are unsuccessful do not in general have a right of appeal and the right of appeal on the part of the GMC is of relatively recent origin (section 40A of the Act having been brought into force on 31 December 2015). The only reported case to which I was referred on section 40A was the case of *General Medical Council v Jagjivan [2017] EWHC 1247 (Admin).* In that case the GMC submitted that the tribunal's decision that the doctor's fitness to practise was not impaired by reason of misconduct and thus his name should not be erased or suspended from the register should be quashed. The court held that the tribunal's failure to find that there was a sexual motivation for the doctor's actions was wrong and unsustainable on the facts as found. This decision provides no guidance as to the principles to be applied on restoration other than to summarise the general approach to appeals under section 40A confirming that:

> *"[40] …in regulatory proceedings the appellate court will not have the professional expertise of the tribunal of fact. As a consequence, the appellate court will approach tribunal*

> *determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence…"*
>
> *"However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the tribunal"…"*

24. I was referred to the case of *R (on the application of Banerjee) v General Medical Council [2015] EWHC 2263*, an application for Judicial Review. That case concerned an applicant who had voluntarily asked for erasure but was then refused reinstatement to the register. She challenged the decision of the panel alleging procedural unfairness. At first instance Walker J said:

> *"125 Important aspects of the powers of the panel were not in dispute. I take them in turn.*
>
> *126 First, the panel has an inquisitorial function. It does not merely hold the ring; panel members can ask questions in an inquisitorial way.*
>
> *127 Second, despite what was said by both parties and the legal assessor during the "closed matters" discussion, the second panel was not bound by findings of first panel.*
>
> *128 Third, <u>in reaching its decision on the second restoration application the panel had a very broad discretion</u>.*
>
> *129 Fourth, the procedure on a restoration application differs from a misconduct hearing. It does not involve a separate fact-finding stage, and it does not entitle an applicant to an opening submission. There is no complaint about this.*
>
> *130 Fifth, while the panel's discretion is a broad one, it has only two options as to its decision: it either allows the application or it refuses it. There is no half way house – it cannot allow the application subject to conditions."* [emphasis added]

Although the case concerned an application for restoration after a voluntary erasure, it was in circumstances where the application for voluntary erasure followed admitted misconduct by the doctor. Although the decision itself is of no relevance to the present case, the dicta set out above are in my view worth noting particularly since it is a recent decision in 2015 involving the GMC where it was not in dispute that the panel has a broad discretion on a restoration application. (Although the case was appealed, there is nothing in the Court of Appeal judgment which directly addresses this point.)

25. I was also referred to the case of *Giele v General Medical Council [2005] EWHC 2143 (Admin)*. In that case Collins J held that the panel had asked itself the wrong question in that it had asked whether there were exceptional circumstances to avoid erasure rather than looking at the misconduct and the mitigation and deciding which sanction was appropriate.

> *"[24] In giving the advice to the Panel, the legal assessor said this:—*
>
> *"I would remind you of various cases that may or may not help you in your decision about sanctions. Essentially the bulk of the cases go to this type or set of offences. Sexual misconduct with vulnerable patients tend to attract erasure but, as [counsel for the appellant] has said, if you feel there are exceptional circumstances, you may, if you so wish, reduce that — if I can call it that — to suspension.*
>
> *Suspension generally is used where the penalty would seem to be outside the range of what is reasonable or may if it were to be erasure. You have to ask yourselves, 'Is this reasonable?' 'Is it going to be wrong to erase in this case?' 'Are there exceptional circumstances?'*
>
> *...*
>
> *[26] That advice was erroneous. The Panel had to approach the question of sanctions starting with the least severe. It was not a question of deciding whether erasure was wrong but whether it was right for the misconduct in question after considering any lesser sanction. Furthermore, it was wrong to ask whether there were exceptional circumstances to avoid erasure. Exceptional circumstances would only avoid the possibility of erasure. A panel member asked whether there was any definition of exceptional circumstances and was given no satisfactory answer. That is not surprising since what is exceptional will depend on the facts of a particular case. But in my judgment it was in this case and will in most cases be unhelpful to talk in terms of exceptional circumstances. The Panel must look at the misconduct and the mitigation and decide what sanction is appropriate, no doubt bearing in mind that improper sexual relationships with a vulnerable patient are always regarded as most serious. That the Panel did have regard to the advice from the assessor is clear from these words in its judgment:*
>
> *"Notwithstanding the impressive mitigation advanced on Mr Giele's behalf, the Panel determined that suspension would neither protect the public interest nor would it be sufficient to maintain public confidence in the profession. The Panel considered whether there might be exceptional circumstances in this case which could lead to the imposition of a lesser*

> *sanction. It decided that there were no exceptional circumstances in this case and that the proportionate sanction was therefore that of erasure."*
>
> *Before saying this, the Panel had said that it had considered the appropriate sanction starting at the lowest. However, what it said shows that it did not carry out its functions in a proper way since it was influenced by the wrong advice given to it*." [emphasis added]

In my view this case also does not assist on the principles to be applied when approaching the issue of restoration: the reference to "exceptional circumstances" is in a different context namely the approach to determining which of the range of sanctions is appropriate and is not therefore helpful.

26. The GMC also relied on *Thobani v The Solicitors Regulation Authority [2011] EWHC 3783 (Admin)*. That was an appeal against a refusal to restore the solicitor to the Role.

> *"[2] … There is no dispute between the parties about the broad legal principles, which apply to questions concerning the discipline of solicitors, and in particular to the proper approach of a Tribunal when considering whether to restore a struck-off solicitor to the Roll. They may be found in the judgment of Sir Thomas Bingham MR in Bolton v Law Society [1994] 1 WLR 512, which echoed the consistent theme of decisions made by his predecessors as Master of the Rolls, and in particular by Lord Donaldson."*
>
> *…*
>
> *[4] In Jideofo v the Law Society (No 06 of 2006), one of two cases in which the then Master of the Rolls, Sir Anthony Clarke, gave judgment on 31 July 2007, he made this observation:*
>
> *"That decision, which has been followed on many occasions, establishes that where a solicitor has committed proven acts of dishonesty he will almost always be struck off the roll. Where there has been serious dishonesty, such as fraud or theft, only after a number of years during which the individual has redeemed his reputation will he be able to seek re-admission. Even then, only in rare cases will such a person be re-admitted. There must be exceptional circumstances justifying restoration to the roll. The reason for this stringent approach is the public interest in protecting the public and maintaining the reputation of the profession."* [Emphasis added]

For the GMC it was submitted that these principles as applied to solicitors should be applied by this court to the present case and counsel stressed the dishonesty in this case where the doctor denied the sexual misconduct accusing the patient of being a stalker and then pursued the matter to an appeal. Counsel also submitted that the principles

should be applied to cases of sexual misconduct which is fundamental for the medical profession and relies on the cases of *Gupta* and *Patel* referred to above.

Conclusion on the proper test for considering applications for restoration to the register

27. In my view it cannot be said that the correct legal test to be applied by a panel on an application for restoration to the register is one of "exceptional circumstances" in the case of sexual misconduct and/or dishonesty nor do I accept that greater weight should be placed on the need to maintain public confidence and uphold professional standards than the remediation undertaken by the individual. I reach this conclusion for the following reasons:

i) Section 41 of the Act gives a broad discretion to a panel of the Medical Practitioners Tribunal Service subject to the qualification that it must have regard to the overarching objective. The overarching objective is the protection of the public. The pursuit of the overarching objective has three limbs: in essence the protection of the health and safety of the public, the promotion and maintenance of public confidence in the medical profession and the promotion and maintenance of professional standards for members of the profession. It was submitted for the GMC that the power of the Solicitors Disciplinary Tribunal when considering whether to restore to the Roll the name of the solicitor who had been struck off was similarly broad under section 47 of the Solicitors Act 1974. However it would appear that there is no framework under that Act similar to the requirement to have regard to the overarching objective. Even if I am wrong on that, the Act in my view provides a framework for restoration. The Act was amended relatively recently to increase the minimum period before an application for restoration to the register could be made and to add subsection (12), the requirement to have regard to the overarching objective. It was open to Parliament at that time to amend the weight to be given to the factors and they did not do so. In *Banerjee* the GMC accepted that it was a broad discretion.

ii) As to the authorities, it seems to me that reliance on the Privy Council in *Gupta* for the extension of the approach from solicitors to doctors does not establish the approach to doctors in relation to restoration. Whilst the dicta in *Bolton* cited above, extend to the approach on restoration to the Roll for solicitors, the Privy Council in *Gupta* (as is evident from the passage cited above) is dealing with the sanction of erasure and there is in my view a significant difference between the original imposition of a sanction of erasure and a subsequent decision whether to restore to the register. It may well be right that, as was held in *Patel*, at the point at which the decision to strike off a doctor is made, subjective factors of mitigation are subordinated to the objective need to protect the public interest. However neither case is authority for the proposition that either as a matter of law or guidance, the reputation of the profession must be afforded greater weight than the "remediation" of the doctor; the statute provides a right to apply after a period of five years and at this point it seems to me a different balancing exercise may be appropriate and the statute has not given greater weight to one factor over another.

iii) In my view this is not a case primarily about dishonesty so the dicta in *Thobani* are not directly relevant. This case is primarily a case about sexual

misconduct although I accept that the lies that followed at the initial hearing and then in the appeal, were dishonest and the tribunal that considered the application to restore took that into account in their determination (paragraph 26 and 35 of the decision). I do accept that sexual misconduct is as fundamental to the medical profession as dishonesty is to the solicitors profession but in my view for the reasons stated above in relation to *Gupta* and *Patel* the principles expressed in *Thobani* do not extend to an application for restoration of doctors to the register so as to impose a different test or a higher test thereby overwriting the words of the statute which give equal weight to the various factors.

iv) Finally I am supported in my conclusion by the GMC's own guidance (referred to above) which makes no reference to any need for "exceptional circumstances" on an application for restoration. The focus of the guidance is on the circumstances that led to erasure, whether the applicant has any insight into the matters that led to erasure and the steps that the applicant has taken to keep his medical knowledge up-to-date and to rehabilitate himself. It was submitted for the GMC that the guidance was focused on what the doctor has to do in order to prepare for an application for restoration to the register. In my view that is not the natural inference from the document. The relevant section setting out the factors is headed "what factors do the Medical Practitioners Tribunal take into account when considering the application for restoration?" It would in my view be highly misleading if there were other factors which were not listed here and that is not the natural reading of the guidance. I note that in annex B to the guidance at paragraph 12 the GMC notes that it can appeal decisions including those to restore doctors to the register. The guidance states that the power to make such an appeal is where it considers that the decision to restore a doctor is not sufficient for the protection of public taking into account protecting the health, safety and well-being of the public, maintaining public confidence in the medical profession, and/or maintaining proper professional standards and conduct for members of that profession. There is no suggestion that restoration will only be made in exceptional circumstances or that the GMC will appeal if the panel has not given greater weight to maintaining public confidence and/or maintaining professional standards over any remediation steps taken by the doctor.

v) Further I note that in its "Aide-memoire for the chair of a Medical Practitioners Tribunal" the GMC makes reference to the legal framework in relation to restoration applications but there is no suggestion that is modified by any applicable line of case law.

Grounds

The decision letter

28. Turning then to the detailed grounds I start with considering the key points as they appear to me in the decision letter:

i) the panel referred to the factors set out in the guidance document setting them out in paragraph 22 of the decision

ii) It referred to the need for the applicant to demonstrate he was fit to practice-paragraph 23

iii) It referred to the overarching objective-paragraph 24

There is nothing to suggest that the panel misdirected itself as to the framework within which it should consider a decision to restore to the register.

29. The decision then dealt with the evidence-the panel referred to the misconduct involving Miss A and the respondent's denial in sworn evidence to the FTP in 2007 and 2008 (paragraph 26 of the decision) describing his conduct as "*entirely reprehensible*" and stating that he "*compounded*" these actions with pursuing the appeal.

30. In the decision, the panel referred to the time elapsed and the methods employed to gain insight and acceptance of his misconduct and dishonesty (paragraph 27 of the decision).

31. Dealing with remediation the panel expressly accepted and placed weight on the evidence of the experts, Dr D and Dr H (paragraph 28 of the decision).

32. The panel noted that the view of Dr D was that the respondent's level of insight had increased enormously during 2 years of ********** to December 2016 and his opinion was that it was "highly unlikely" that the respondent would repeat the misconduct through transgression of boundaries (paragraph 29 of the decision). The panel noted that Dr D stated that "initially" the respondent struggled to understand why he had been erased rather than suspended, however as sessions progressed the respondent developed "*considerable insight*" into the gravity of his denials and dishonesty.

33. Dealing with the evidence of Dr H, the panel noted that in his first report in March 2015 Dr H concluded that the respondent had "*limited understanding of why you had acted in the way you had*" but by the time of the second report in October 2016 Dr H was of the view that the respondent had made "*considerable progress*" in increasing insight and was "*fit to practise without restriction*" (paragraph 31 of the decision)

34. The panel then found that the respondent was a credible witness; the panel accepted that the respondent was "*occasionally vague*" in answering questions on certain details of the events of 2005 and his behaviour towards Miss A. However it specifically rejected the contention of counsel for the GMC that he was "*still not accepting*" Miss A's account of events. (Paragraph 33)

35. The panel expressed the view that the failure on the part of the respondent to remember specifics reflected the passage of almost 12 years since the events in question rather than any deliberate attempt on his part to conceal his actions. It noted that the respondent accepted that most of the details of the account were correct.

36. In considering the respondent's insight into the matters that led to erasure, the tribunal stated that it was of the view that the respondent was "*deeply ashamed of both your sexual misconduct and the protracted deceit which followed in your attempts to cover it up*". (Paragraph 34 of the decision)

37. The tribunal expressly referred to the submission of counsel for the GMC that the failure to apologise earlier to Miss A demonstrated a lack of truth and insight but balanced this against the evidence of Dr H that apologies to patients in these circumstances can be counter-productive and needed very careful consideration. The tribunal therefore concluded "*on balance*" that it accepted the respondent's evidence that he intended the current application and hearing to facilitate a formal apology and the panel was satisfied that he now "*sufficiently appreciated the serious negative impact that his behaviour had on Miss A."* (Paragraph 34 of the decision)

38. The panel expressed the view that the respondent had sufficiently remediated the conduct which led to his erasure and his subsequent "*sustained dishonesty*". The tribunal accepted the evidence of both Dr H and Dr D that the respondent had full insight into his actions and the effects they had. (Paragraph 35 the decision)

39. The tribunal considered whether the respondent had taken sufficient steps to keep his medical knowledge and skills up to date. It took into account his clinical attachments, guidance from a mentor, academic reading, online learning modules and training (Paragraph 36 of the decision).

40. The tribunal noted that it could not impose restrictions on his registration as part of a return to practice but noted that any return would be in an approved practice setting requiring the respondent to work with appropriate supervision and appraisal. In this context the tribunal also placed weight on the evidence of Dr Banerjee. Dr Banerjee's evidence was that he had been able to assess 50 to 60% of clinical areas and concluded that the respondent had the knowledge and skills to practise at the level of a Foundation year 2 doctor. The tribunal then concluded "*given all of the above*" that your medical knowledge and skills were sufficiently up-to-date to permit a safe return to practice. (Paragraph 37 of the decision)

41. The conclusion of the panel is set out in paragraph 38 as follows:

> *"in all the circumstances, the tribunal considered that the overarching objective, and in particular the public interest, would not be compromised through the restoration of your name to the medical register. It was of the view that you have accepted your wrongdoing, you have reflected appropriately, significantly gained in maturity and insight, and gained substantial understanding in regard to the proper boundaries and relationships with patients, and the central role of honesty and probity in the medical profession. It found that you have made sufficient progress such that you have demonstrated that you are now fit to practise, that you are a fit and proper person to be restored and that taking such a course would be an appropriate and proportionate response."*

Ground one: Failure to consider the evidence of previous inconsistent and untruthful accounts and/or to give reasons regarding the same

Submissions

42. For the GMC it is submitted that the tribunal failed to give proper scrutiny to the application despite the fact that it was for the doctor to demonstrate his fitness to practice. It is submitted that it was a key part of the GMC's case that the doctor had not been truthful or candid in his accounts of the underlying events concerning Miss A, both given to Dr H and to the tribunal.

43. The GMC criticises the approach of the tribunal in paragraph 33 finding the respondent to be a credible witness at the hearing. The GMC submits that the panel failed to assess the applicant's credibility at the hearing in the light of the evidence of previous accounts given by him. In particular the tribunal did not deal with acknowledged lies to Dr H in 2014/early 2015; the argument that the accounts given to Dr H showed that the doctor was attempting to portray himself in a favourable light; the context of his application statement; and his reference to his suspension when dealing with Professor Banerjee. In relation to Dr H the applicant admitted at the hearing that the account given to Dr H in 2014/early 2015 was not true. The GMC submits that the tribunal failed to consider the relevance of this admission to the credibility of his evidence in 2017.

Discussion

44. At paragraph 21 of the decision the tribunal expressly stated that it had considered the submissions made on behalf the GMC. The submissions are not rehearsed in detail nor do they need to be so. However the panel do summarise the key submissions for the GMC at paragraphs 18 to 20. In particular the tribunal stated:

> *"[18] Mr Jackson submitted that your application should be refused. He told the tribunal that you have not sufficiently remediated either your serious sexual misconduct or the allied and sustained dishonesty which followed it. He stated that it is still unclear whether you have full insight into the extent of your actions, and that you have not yet fully acknowledged the likely impact of your actions towards Miss A. He referred to your sessions with Doctor H in 2014 2016, submitting that you had sought to minimise your role in regard to sexual misconduct while simultaneously describing your actions as "inhuman" in an effort to show you had full remorse."* [Emphasis added]

45. It is clear that the tribunal considered the respondent's actions over the period from 2009. The tribunal noted that the respondent had "*limited insight*" when seen by Dr H for the purposes of his first report dated March 2015 but that by the time the second report he had made "*considerable progress*" in increasing his insight into his actions. (Paragraph 31 of the decision).

46. The relevant paragraph dealing with credibility is paragraph 33 of the decision. The MPT stated:

> "*the tribunal found you to be a credible witness at this hearing. Whilst it considered that you were occasionally vague in answering questions on certain details of the events of 2005 and your behaviour towards Miss A, it did not accept Mr Jackson's contention that you were still not accepting Miss A's account of events. In your evidence you said that you could not remember the specifics of what occurred and so could not agree with all of Miss A's description, although you accepted that most of the details of her account were correct, and that you had visited her home on the second occasion with sexual motivation. The tribunal was of the view that this reflected the passage of almost 12 years since the events in question and the inevitable deleterious effects on recollections of events, rather than any deliberate attempt on your part to conceal your actions." [Emphasis added]*

47. In my view it cannot be said that the tribunal had not considered the GMC's submissions, as it refers to them expressly. The tribunal had clearly read the two reports referring to them expressly and there is reference to "*limited insight*" which I infer to be a reference to his lack of honesty in the initial interviews.

48. The tribunal clearly considered the submission of the GMC that it suggested that the respondent was not accepting the account of what happened of Miss A. In paragraph 33 the MPT expressly rejected this submission and noted that in any event the respondent accepted that most of the details of the account were correct notably that he visited her home on the second occasion with sexual motivation. The tribunal was best placed to assess the credibility of the witness and I do not accept that there was a failure by the MPT to consider the evidence of previously inconsistent and untruthful accounts.

49. This conclusion is supported by the transcript of the proceedings. Although the following extracts are merely extracts of much longer exchanges, in my view they demonstrate that the tribunal was well aware of the issue of the inaccurate accounts both in the application form and to Doctor H.

    i) On Day 2 the chair of the MPT himself raised the question of the inconsistency between the respondent's evidence to the tribunal and his application for restoration. He took Doctor C to the relevant section of his application and said [D2/29 C]:

    > *"this is your application for restoration… The question the tribunal have is we are struggling to marry together what is stated in the third paragraph from the bottom, that in April 2012 you said when you made your application of restoration you were fully ready to accept your wrongdoings, and your evidence of early this morning regarding the position in late 2014 when you had an interview with Doctor H and you said that you still were not at that point fully ready to accept your wrongdoings. We are not sure whether we misunderstood your evidence this morning, but they do not appear to be obviously comfortable, those two statements, with each other and we*

> *thought we would give you an opportunity to explain to us how you sit these two together bearing in mind both these things are relatively recent documents – your application for restoration and also your evidence this morning, very recent indeed."* [emphasis added]

ii) On Day 3 it was put to Doctor H by counsel for the GMC, Mr Jackson QC, that in making his assessment that the applicant had gone through a process of remediation and developed insight into his sexual misconduct:

> *"he has not been entirely frank with you as to the detail and that to look at it simply as a boundary violation does not allow you to form a judgment as to whether or not he has developed the necessary insight*"

Mr Jackson then put to Doctor H the account which the respondent had given to Doctor H admitting that sexual misconduct had occurred but with him as the passive participant. Mr Jackson asked Doctor H [D3/24 D]:

> *"would you be concerned that he is not even in 2016 – 10, 11 years on – still not really saying, "I have hit rock that you cannot go beyond and I have accepted everything and I am being entirely truthful*"

He further asked [D3/24 H]:

> *"when you say that Doctor C has travelled a significant way, are the tribunal to draw from that that he has not yet completed the necessary steps in terms of developing insight and remediation that would allow you to offer your view that he is ready to practice…"* [emphasis added]

Doctor H responded [D3/25 B]:

> *"No. What I am suggesting is that there is always more work to be done but that he has made significant psychological changes in his life across a whole range of areas… That I stand by my statement that where he is at this stage, he is in my view fit to practice."* [emphasis added]

iii) Mr Jackson returned to the issue of the inaccurate account later in the cross-examination of Doctor H. Mr Jackson said [D3/29/A]:

> *"he said different things at different times about what happened. He denied it all to the panel. He gave a false account you in 2014 as to what had happened. He has put in his document which he provided to the tribunal, and it will be for them as to whether or not he has shaded since he wrote that document which he provided for your second report, as to whether or not he has now been even more forthcoming about what he did. If that is an ongoing process, might that be an*

> *indicator that he is still not develop the required insight because he is still not accepting what happened?"[emphasis added]*
>
> Doctor H replied:
>
> *"I think that as I have indicated, that the psychological shift that he has made in all these aspects of his life allow me a view that he is now someone who has sufficient insight, is being sufficiently honest, that he is highly unlikely to commit such an action again. It would have to be something – I cannot imagine what it would be that he is not telling is and that might be available elsewhere so that we might be able to verify, that would be of such significance that that view does not hold."* [emphasis added]

50. As to Dr Banerjee it is again clear from the transcript that Dr Banerjee was told that he was suspended and counsel for the GMC chose not to press the point. It cannot therefore be said to have been a key submission or essential to the reasons for the decision but even if it were, it was a point that was made to the tribunal.

Was there a failure to give reasons?

51. Counsel for the GMC submits that there was a failure to give adequate reasons on this point and reasons must "*adequately meet the substance of the arguments advanced"* and show that the decision-maker successfully came to grips with the "*main contentions*" advanced by the parties.

52. Counsel for the respondent relies on Newman J in *Needham v The Nursing and Midwifery Council [2003] EWHC 1141 (Admin)* at paragraph 11:

> "*Neither the 1997 Act nor the Nurses, Midwives and Health Visitors (Professional Conduct) Rules 1993 impose any obligation upon the Committee to give reasons for its decision, but it is not disputed that fairness required reasons to be given. As to what is required, certain cases in the sphere of professional conduct hearings, have established the following.*
>
> *i) Whether sufficient reasons have been given will depend upon the particular circumstances of the case.*
>
> *ii) That resort may be had to the transcript of the hearing (See Gupta v General Medical Council [2002] 1 WLR 1691), particularly where the transcript will reveal which evidence the committee accepted and which it rejected. (See Wickramsinghe v United Kingdom [1998] EHRLR 338)*
>
> *iii) That a general explanation of the basis for the determination on the questions of serious professional misconduct and of penalty will normally be sufficient. (Selvanathan v GMC [2001] Lloyds' Rep Med 1)*

> *iv) That the fact that an appellant had not been prejudiced by the failure to give reasons was irrelevant. (Brabazon-Drenning v United Kingdom Central Council [2001] HRLR 6)*
>
> *v) That reasons need not elaborate nor be lengthy but should be such as to tell the parties in broad terms why the decision was reached."[emphasis added]*

53. In my view the adequacy of reasons has to be tested against the entirety of the decision and the key questions which the tribunal had to address. Taken as a whole it is clear why the tribunal reached the decision on restoration. Having regard to the transcript, the issue of the inconsistent accounts was clearly considered by the tribunal in reaching its conclusions and any failure to provide a fuller explanation on its finding of credibility was not in my view such as to amount to a basis for interfering with the decision. (*Threlfall v General Optical Council [2004]EWHC 2683 para 32; Phipps v The General Medical Council [2006]EWCA Civ 397 para 106).* The decision in my view addressed the main contentions. Further the tribunal was reaching a conclusion on the question of credibility a matter which was particularly within its expertise having heard the witnesses cross-examined over a period of days.

Ground 2: failure to apologise to the patient

54. The GMC submits that when assessing the extent of the respondent's insight and his remediation, the tribunal failed to give any proper consideration to the doctor's failure to give an apology prior to the tribunal hearing.

55. At paragraph 34 of the decision, the tribunal expressly referred to the submission of counsel for the GMC that the failure to apologise earlier to Miss A demonstrated a lack of truth and insight but balanced this against the evidence of Dr H that apologies to patients in these circumstances can be counter-productive and needed very careful consideration. The tribunal stated:

> *"the tribunal was of the view that you are deeply ashamed of both your sexual misconduct and the protracted deceit which followed in your attempts to cover it up. You were at points very emotional in giving evidence about your actions and the tribunal accepted that this was not feigned for effect. You told the tribunal that you did not think any words or apology could fully heal or repair the damage you have done, but you want to apologise to Miss A. It found that you demonstrated genuine remorse for your behaviour, and it accepted that your apologies to all who had been impacted by them, in particular Miss A, were sincere. The submission by Mr Jackson that the failure to apologise earlier demonstrated a lack of truth and insight was balanced against the evidence of Doctor H that apologies to patients in the circumstances can be counter-productive and themselves needed very careful consideration…"*

56. The tribunal therefore concluded "*on balance*" that it accepted the respondent's evidence that he intended the current application and hearing to facilitate a formal

apology and the panel was satisfied that he now "*sufficiently appreciated the serious negative impact that his behaviour had on Miss A."*

57. The tribunal expressly addressed the submission for the GMC that the failure to apologise earlier demonstrated a lack of truth and rejected this submission relying on the evidence of Dr H. There is nothing irrational or unlawful in that conclusion of the MPT. This ground is not made out.

Ground three: the requirements of the public interest

58. For the GMC it was submitted that the tribunal failed to give any proper regard to the overriding public interest and to the need to promote and maintain public confidence in the medical profession in particular. Counsel submitted that these issues received only brief attention in paragraph 38 of the determination although they lay at the heart of the issues for the tribunal. In particular the GMC submitted that serious consideration was required of the timing of the development of the respondent's insight, the absence of any apology up to the point of the hearing, and the impact upon public confidence of restoring to the register at this time a doctor who had committed these serious acts of sexual misconduct and dishonesty.

59. For the GMC it was submitted that the authorities regarding the difficulty of achieving "remediation" in cases of sexual offending are relevant – *Yeong v GMC* [2009] EWHC 1923 (Admin).

60. *Yeong* was an appeal against a decision of a Fitness to Practise Panel that the fitness to practise of the claimant was impaired by reason of misconduct and a decision to suspend his registration for 12 months. One of the grounds of challenge was that the Fitness to Practise Panel had applied an incorrect test of impairment of fitness to practise. It was submitted for the GMC that where a tribunal is considering a case where the misconduct consists of entering into a sexual relationship with a patient, this violates such a fundamental rule of the professional relationship that a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case it was submitted the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in the case where the misconduct consists of clinical errors or incompetence.

Sales J noted that the overarching function of the GMC was to have regard to the public interest in the form of maintaining public confidence in the medical profession generally and in the individual medical practitioner. He said:

> *"[50]… Where a medical practitioner violates such a fundamental rule governing the doctor/patient relationship as the rule prohibiting a doctor from engaging in a sexual relationship with a patient, his fitness to practise may be impaired if the public is left with the impression that no steps have been taken by the GMC to bring forcibly to his attention the profound unacceptability of his behaviour and the importance of the rule you have had violated.…*

> *[51] Secondly where a FTPP considers that fitness to practise is impaired for such reasons, and that a firm declaration of professional standards so as to promote public confidence in that medical practitioner and the profession generally is required, the efforts made by the practitioner to address his problems and to reduce the risk of recurrence of such misconduct in the future may be of far less significance than in other cases, such as those involving clinical errors or incompetence…."*

61. The situation here however is in my view very different from *Yeong* as the FTP is considering here whether to restore the respondent to the register. The profound unacceptability of the respondent's behaviour has been clearly declared by his erasure from the register. Further in its decision whether to restore the respondent to the register, the tribunal expressly took into account the seriousness of his behaviour. This is stated clearly at paragraphs 26 and 27 of the decision:

> *"[26] The tribunal was in no doubt that your actions between 2005 and 2009 were very serious and fundamentally incompatible with registration…*
>
> *[27] The tribunal has taken into account the seriousness of your behaviour in the period between 2005 and 2009…" [Emphasis added]*

62. The FTP considered both the overall offending and the insight and steps taken in the meantime in order to reach its conclusion. I do not accept that the timing of the development of the respondent's insight was not considered. The tribunal made reference (paragraph 27 of the decision) to the evidence of the respondent that he had been on a "*journey*" of awareness and learning, attempting to fully accept and gain insight into his actions. It also referred to the evidence of Dr H (at paragraph 35) that a journey of remediation will always be "*ongoing*". The tribunal noted that the evidence of Dr H was that the respondent had a "*limited understanding*" of why he had acted in the way he had at the time of his first report but that the evidence of Dr H was that by the time of his second report in October 2016 the respondent had made "*considerable progress*" in increasing his insight into his actions. I have already addressed above the issue of inconsistency in the accounts given by the respondent and the absence of an apology up to the point of the hearing. In my view there is no failure or error on the part of the tribunal in relation to these issues.

63. As to the impact upon public confidence of restoring to the register at this time a doctor who had committed the serious acts of sexual misconduct and dishonesty, I do not accept that the tribunal failed to give proper regard to the overriding public interest and to the need to promote and maintain public confidence in the medical profession. At the start of the decision letter at paragraphs 21 – 25, the tribunal sets out its approach and refers in particular at paragraph 24 to the statutory overarching objective which includes promoting and maintaining public confidence in the medical profession. In its conclusion at paragraph 38 it refers again to the overarching objective and in particular "the public interest". I have already dealt with the case of *Yeong*. The tribunal did not in any way minimise the seriousness of the behaviour describing the sexual misconduct and the respondent's subsequent dishonest denials

of his actions in sworn evidence in 2007 and 2008 as "entirely reprehensible". The tribunal stated (paragraph 26):

> *"your actions forced Miss A, who was a vulnerable patient, to endure extensive cross examination questioning her mental health, and regarding the events which had occurred, making her out to be a liar when you knew that she was telling the truth. The tribunal considered that you compounded these actions with a continuation of this deceit in pursuing an appeal against the erasure decision of the FTP panel, in the full knowledge that it was you that was giving an untruthful account of events, not Miss A, prolonging her ordeal."*

64. It is against that background that (as summarised above) the tribunal then considered the evidence of the experts and the respondent as to his insight (including the issue of the apology), the opinion of Dr H that the respondent was now fit to practice without restriction and his current medical knowledge and skill. In all the circumstances the MPT concluded that:

> *"the overarching objective, and in particular the public interest, would not be compromised through the restoration of your name to the medical register."*

65. Taking the decision letter as a whole, there is no basis it seems to me for any finding that the tribunal failed to give proper regard to the overarching objective in general or to the public interest in particular.

Conclusion

66. For the reasons stated above the appeal is dismissed.